

BUDGET 2021: GOVERNMENT TARGETS STRATEGIES TO AVOID TAX DEBTS

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In Budget 2021, the Government announced its intention to introduce a number of measures to address what it perceives to be aggressive tax planning transactions designed to avoid tax liabilities that would otherwise arise under section 160 of the *Income Tax Act* (Canada) (the “**Tax Act**”).

Section 160 of the Tax Act targets circumstances where property is transferred by a taxpayer to a person with whom the taxpayer does not deal at arm’s length for less than fair market value consideration, thereby depleting the assets of the taxpayer that are available to satisfy tax debts.

If section 160 applies in respect of a property transfer, the transferee generally becomes jointly and severally liable for the transferor’s tax debts that arose in respect of the taxation year in which the property is transferred or any preceding tax year.

A transferee’s liability under section 160 of the Tax Act is generally limited to the difference between the amount of consideration given for the transferred property and the actual fair market value of the property.

The changes proposed in Budget 2021 come on the heels of recent decisions of the Federal Court of Appeal in *Eyeball Networks Inc. v. Canada* and the Tax Court of Canada in *Damis Properties Inc. v. The Queen* in which the Court had to grapple with the scope and application of section 160.

Budget 2021 proposes three new anti-avoidance measures to address what the government views as transactions undertaken to circumvent section 160 of the Tax Act.

First, a new anti-avoidance rule will be introduced to deem a tax debt to have arisen prior to the end of a particular taxation year in which a transfer of property occurs if the following two conditions are met: (a) the transferor was aware that it would have a tax amount owing that would arise after the end of the taxation year; and (b) the avoidance of the payment of the future tax debt was one of the purposes for the transfer of the property. This new anti-avoidance rule is designed to prevent the deferral of tax debts until after the end of the taxation year in which particular property is transferred.

Second, the government will introduce a new deeming rule whereunder a transferor and a transferee will be

deemed not to deal with one another at arm's length if two conditions are met. Specifically, the deeming rule will apply if: (a) the transferor and transferee did not deal at arm's length at any time during the series of transactions or events that included the subject property transfer; and (b) it is reasonable to conclude that one of the purposes of a transaction or event (or series of transactions or events) during the series was to cause both parties to be at arm's length at the time of the transfer. The proposed deeming rules aims to prevent taxpayers from artificially creating an arm's length relationship at the time of a transfer to avoid liabilities arising under section 160 of the Tax Act.

Finally, a third interpretive rule will be introduced that will examine the overall result of a series of transactions of which a transfer of property is a part when determining the value of such property and the consideration given for the property. This new interpretive rule is intended to prevent the use of certain tax planning tools to attempt to reduce the transfer value of property over the course of a series of transactions.

In addition to the anti-avoidance measures discussed above, the government intends to introduce a special penalty that would apply to planners and promoters of "tax debt avoidance schemes". The penalty will be equal to the lesser of: (a) 50% of the tax that is attempted to be avoided; and (b) \$100,000 plus the compensation earned by the promoter or planner of the scheme.

The new proposed legislation will apply to property transferred on or after April 19, 2021.

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A Cautionary Note

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